IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 11TH JUNE 2007 / 21ST JYAISHTA 1929

SA.No. 789 of 1993()

AS.38/1991 of DISTRICT COURT, THODUPUZHA DT.20.7.1993
OS.1/1986 of MUNSIFF COURT, IDUKKI

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APPELLANTS/ RESPONDENTS 2 TO 5 & DEFENDANTS 2 TO 5
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1. **CHELLAPPAN, S/O. DEVADAS,**
   RESIDING AT SEMINI VALLEY ESTATE
   P.O. ELAPPARA, IDUKKI DISTRICT

2. **THANKAMMA W/O. CHELLAPPAN,**
   RESIDING AT SEMINI VALLEY ESTATE,
   P.O.ELAPPARA, IDUKKI DISTRICT,.

3. **AMBROSE, S/O.CHELLAPPAN,**
   RESIDING AT SEMINI VALLEY ESTATE
   P.O. ELAPPARA, IDUKKI DISTRICT.

4. **ENOS, S/O. CHELLAPPAN,**
   RESIDING AT SEMINI VALLEY ESTATE,
   P.O.ELAPPARA , IDUKKI DISTRICT.

BY ADV. SMT.A.C.VIDYA

RESPONDENTS: APPELLANT & IST RESPONDENT – PLAINTIFF & IST DEFENDANT
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1. **THE HAILEY BURIA TEA ESTATE LTD.,**
   KYTHARAM BUILDINGS, KOTTAYAM.

2. **BALAKRISHNAN, S/O.NESAMANI,**
   WORKER CHECK ROLL NO.299,
   SEMINI VALLEY ESTATE, ELAPPARA VILLAGE,
   P.O.ELAPPARA , DISTRICT IDUKKI.

BY ADV. SRI JOSEPH MARKOS-R1, R2
SRI.JOSEPH KODIANTHARA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.1944/1993 IN SA. NO.789/1993

DISMISSED

11/06/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 789 OF 1993

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DATED THIS THE 11th DAY OF JUNE, 2007

JUDGMENT

Defendants in O.S.1/1986 on the file of Munsiff Court, Idukki are the appellants. Respondent is the plaintiff. The suit was instituted by the respondent seeking a decree for declaration of title and recovery of possession of item No.1 of the plaint schedule property. Item No.2 of the plaint schedule property is a shed in item No.1 of the property. According to respondent, item No.1 of the plaint schedule property having an extent of 1.05 acres is comprised in survey No.506 and 677 of Elappara Village and it is a portion of Seminy Valley Estate belonging to the respondent company. The land comprised in Survey No.506 was conveyed in favour of a British Christian by name Frank Bissent by the Government of Travancore under Ext.A3 sale deed dated 25.7.1932 and the land comprised in Survey No.677 was transferred to the same Frank Bissent by the Travancore Government as per Ext.A2 sale deed dated 27.6.1932. While Frank Bissent has been in possession and enjoyment of the property under Ext.A1 registered sale deed dated 20.3.1946 it was transferred to respondent company and

thus respondent company has been in possession and enjoyment of Seminy Valley Estate including item No.1 of the property.

2. It was contended that the first appellant is employed by the respondent in the Estate and in that capacity under Ext.A4 agreement a license was granted in his favour for the purpose of raising kitchen garden in item No.1 of the property. It was contended that Ext.A4 specifically provide that first respondent is not entitled to effect any permanent improvements and even if he makes improvements he is not entitled to get the value of improvements. Contending that though first respondent was granted a license, he was not in exclusive possession of the property and subsequently on 30.12.1976 appellants 2 to 6 trespassed into the plaint schedule property by force and put up a shed described as item No.1 in the plaint schedule property and the said construction is illegal and respondent sought a decree for declaration of title and recovery of possession. Appellants in their joint written statement disputed the rights of the respondent to the plaint schedule property. It was contended that the correct Survey Number of the plaint schedule property is Survey No.1022 and it is not included in Ext.A1 title deed claimed by the respondent or the anterior title deeds and

item No.1 of the plaint schedule property is the property obtained by first respondent as assignment and the said property originally belonged to the Government and as first appellant has been in possession of the property, Government initiated KLA 444/67 and thereafter a patta was assigned in favour of the first respondent and while so, first respondent transferred that right in favour of second respondent under Ext.B1 assignment deed dated 25.2.1976 and second appellant has been in possession of the property since then and respondent is not entitled to the decree sought for. It was contended that in any case appellants are entitled to get a value of improvements of Rs.10,000/- which was subsequently enhanced to Rs.1,78,750/- by later amendment of the written statement.

3. Learned Munsiff, on the evidence originally granted a decree in favour of the respondent. Appellants challenged the decree and judgment before Sub Court, Thodupuzha in A.S.34/1981. Learned Sub Judge, on reappreciation of evidence, finding that property covered under Ext.X1 patta obtained by the first respondent was not properly identified, the decree and judgment were set aside and suit was remanded back to the trial court. At that time, Munsiff Court, Thodupuzha was constituted

and suit was thereafter transferred to Munsiff Court, Thodupuzha. A commission was appointed and Commissioner submitted Ext.C2 report and C2(a) plan.

4. Learned Munsiff, on the evidence of Pws 1 to 4, Dws 1 to 5, Exts.A1 to A4 and B1 to B3, C1 to C2(a) and Ext.X1 held that respondent failed to establish the title to the plaint schedule property and item No.1 of the plaint schedule property is part of the property obtained by first respondent under Ext.X1 and later transferred under Ext.B1 to the second respondent and therefore respondent is not entitled to the decree sought for. The suit was dismissed. Respondent challenged the decree and judgment before District Court, Thodupuzha in A.S.38/1991. Learned District Judge elaborately considered the question in the light of the evidence on record including documentary and oral evidence. Learned District Judge found that trial court went wrong in holding that plaint schedule property is not part of the property obtained under Ext.A2 and A3. Holding that boundaries of the property covered under Exts.A2 and A3 are the boundaries of the entire properties in Survey No.677 and 506/6, learned District Judge found that the non tallying of the boundaries is not fatal and evidence establish that the disputed

property is in Survey No.677 and 506/3 and not in Survey No.1022. Learned District Judge also found that under Ext.X1 the property obtained by first respondent is in Survey No.1022 and not in Survey No.677 or 506/3. It was therefore held that respondent, under Ext.A1 to A3 has title to the plaint schedule property and appellants have no title to the property. Holding that first respondent is only a licensee under Ext.A4 and second respondent assignee under Ext.B1 cannot claim a better title and finding that under Ext.A4 first appellant is not entitled to effect improvements, learned District Judge held that appellants are not entitled to the value of improvements also. A decree was granted in favour of the respondent as prayed for. Respondents in the appeal who are the defendants in the suit have preferred this second appeal challenging the decree and judgment passed by the first appellate court.

5. Though the appeal was admitted in 1993, substantial question of law was not formulated at that time.

6. Learned counsel appearing for the appellants and respondent was heard.

7. The learned counsel appearing for appellants argued that when the suit was originally decreed by the trial court,

appellants challenged the decree before the first appellate court in A.S.34 of 1981 and the learned Sub Judge set aside the decree and judgment passed by learned Munsiff and remanded the suit with a direction to remit the report back to the Commissioner and though Ext.C1 report and C1(a) plan filed by the Commissioner were not explicitly set aside, as a second commission could not have been issued without setting aside the first report, Ext,C1 and C1(a) report and plan are deemed to have been set aside and therefore in the subsequent appeal, first appellate court was not justified in relying on Ext.C1 report or C1(a) plan or granting a decree on the basis of Ext.C1(a) plan and therefore the decree and judgment is unsustainable. Relying on a Division Bench ruling of this court in **Swami Premananda Bharathi V. Swami Yogananda Bharathi**(1985 KLT 144) learned counsel argued that if the second Commissioner was appointed without setting aside the first report, the second report is to be treated as nonest and is to be eschewed from evidence and therefore in view of the remand order Ext.C1 report and C1(a) plan are deemed to have been set aside and therefore first appellate court should not have granted the decree on that basis. The learned counsel argued that the

evidence establish that the property claimed by respondent under Exts.A2 and A3 does not take in the plaint schedule property which is part of Government Puramboke land, which was in fact assigned in favour of second respondent under Ext.X1 land assignment proceedings and thereafter obtained by appellants under Ext.A1 assignment deed executed by second respondent and hence decree for recovery of possession granted is unsustainable. It was also argued that in any case when the evidence establish that appellants have effected valuable improvements, as bonafide purchasers under Ext.B1, first appellate court should have at least granted the value of improvements and without paying the value of improvements, in any event first respondent is not entitled to the decree sought for.

8. Learned counsel appearing for first respondent argued that the property claimed by second respondent and appellants is in Survey No.1022 which lies to the east of the disputed property and not part of the plaint schedule property and evidence establish that item No.1 of plaint schedule property is part of Survey No.677 and 506/3 and first respondent has title to the property under Exts.A2 and A3 and the subsequent

assignment under Ext.A1. It was also argued that first appellate court elaborately considered and entered a factual finding that the plaint schedule property is part of the property covered under Exts.A1 to A3 and in such circumstances this court may not interfere with that finding and in any case it is not a substantial question of law. The learned counsel also argued that there is no difference between the identification of property made in Ext.C1(a) plan and C2(a) plan and even if Ext.C2 report and C2(a) plan are to be eschewed from the records, Ext.C1 and C1(a) plan establish that plaint schedule property is part of property obtained by first respondent under Ext.B1 which in fact is the property covered under Exts.A2 and A3 and first appellate court rightly granted a decree for recovery of possession. It was argued that Ext.A4 license specifically prohibits second respondent licensee from effecting any permanent improvements and it also provides that if in violation of the terms second respondent effects improvements, he is not entitled to the value of improvements and being assignees of the second respondent under Ext.B1, appellants are not entitled to claim any value of improvements and second appeal is only to be dismissed.

9. The following substantial questions of law are involed in

the second appeal.

1)Whether Ext.C2 report and C2(a) plan could have been relied on by the courts below, when Ext.C1 report and C1(a) plan were not set aside before appointing the second Commission in view of the decision of this court in **Swami Premananda Bharathi.** V. **Swami Yogananda Bharathi**(1985 KLT 144).

2) Whether finding of the first appellate court that item No.1 of the plaint schedule property is part of the property covered under Exts.A2 and A3 and obtained by first respondent under Ext.A1 is sustainable and if so whether first respondent has title to the property.

3)Whether the finding of first appellate court that item No.1 of the property is not part of the property obtained by second respondent under Ext.X1 is sustainable and if not whether appellants are entitled to value of improvements effected in the property.

10. When a decree was granted in favour of the first respondent, appellants herein challenged the decree and judgment before Sub Court, Thodupuzha in A.S.34 of 1981. As per judgment dated 7.4.1982, first appellate court remanded the suit back to the trial court for fresh disposal holding that the

property covered under Ext.X1 patta which is the property assigned by the second respondent in favour of the appellants under Ext.B1, is to be fixed and thereafter the question is to be decided. As rightly found by first appellate court in the subsequent judgment, a reading of the order of remand in A.S.34 of 1981 establish that Ext.C1 report and C1(a) plan were not set aside by the first appellate court. First appellate court did not enter a finding that identification of the property in Ext.C1 report and C1(a) plan are not reliable or were incorrect. Instead, first appellate court only stated that Commissioner has not demarcated the property covered under Ext.B1 which in turn was the property obtained by second respondent under Ext.X1. It is for that purpose, the suit was remanded. The proceeding paper of the trial court shows that after the remand instead of remitting the report back to the same Commissioner, a new Commission was appointed. Proceeding paper also shows that neither the appellants nor first respondent objected to the procedure. The Commissioner submitted Ext.C2 report and C2 (a) plan. No objection was filed contending that report is illegal and Ext.C2 and C2(a) report and plan cannot be relied on as the second Commission was appointed without setting aside the first

report. A perusal of Ext.C1(a) plan and C2(a) plan show that there was no marked difference between the two plans. As found by the first appellate court the property as identified by the Commissioner in Ext.C1(a) and Ext.C2(a) plan are almost identical and tallies with the other. In such circumstances, it cannot be said that first appellate court was not justified in granting a decree based on Ext.C1(a) plan.

11. A Division Bench of this court in Swami Premananda Bharathi's case (supra) considered the validity of a report submitted by second Commissioner without setting aside report submitted by the first Commissioner. Holding that a second Commissioner could be appointed only after setting aside the first report, their Lordships of the Division Bench considered the effect of the second report. Their Lordships held that the second report is illegal and will not hold good and has to be eschewed from the records and if the first report is not reliable, the only option available to the court is to set aside the report or to remit the report back to the Commissioner, to submit a further report in the light of the objection. In the light of that decision Ext.C2 report and C2(a) plan submitted by the Commissioner are to be eschewed from the records as first report was not set

aside. The argument of the learned counsel appearing for the appellants that the remand order has to be treated as impliedly setting aside Ext.C1 report and C1(a) plan cannot be accepted. In fact the original remand order shows that no defect on the identification or demarcation of the property under Ext.C1 report and C1(a) plan was accepted by first appellate court. The direction to remand the report was only to demarcate the property covered under Ext.X1 patta.

12. The property claimed by the appellants is the property comprised in Survey No.1022. Ext.X1 got summoned from the revenue authorities and the evidence of DW1 the Village Officer establish that the property assigned in favour of second respondent under the land assignment proceedings is the property in Survey No.1022. In fact this position was admitted by the appellants themselves as what was contended in the written statement was that plaint schedule property is in Survey No.1022 and not in Survey No.677 or 506/3. There was no case for the appellant that the property assigned under Ext.X1 to second respondent is the property comprised either in Survey No.676 or in Survey No.506/3 of Elappara Village. The evidence would conclusively establish that the disputed property is in

Survey No.677 and Survey No.506/3. Learned counsel appearing for the appellants then vehemently argued that Survey number mentioned in Ext.X1 is a mistake and property is in Survey No.677 and 506/3. Such a case was not pleaded by the appellants. On the other hand they reiterated the contentions raised in the written statement that the disputed property is in Survey No.1022. If that be so, the property obtained by second respondent and later assigned by second resondent under Ext.B1 can only be that property which lies in Survey No.1022. If the plaint schedule property is in Survey No.677 and 506/3, as rightly found by the first appellate court on the basis of the evidence, appellants cannot claim any right over the said property.

13. Though learned counsel vehemently argued that as first appellate court has relied on Ext.C2 and C2(a) report and plan, the decree granted is to be set aside, it is seen from the judgment of first appellate court that decree was in fact granted not on the basis of Ext.C2(a) plan but on the basis of Ext.C1(a) plan. If at all it is only Ext.C2 report and C2(a) plan which are to be eschewed from records as second report was submitted without setting aside the first report I find no substantial

question of law as such arises for consideration on that aspect.

14. Though learned counsel appearing for appellant vehemently argued that boundaries of the plaint schedule property do not tally with the boundaries shown in Exts.A2 and A3, first appellate court rightly appreciated the evidence. The property covered under Exts.A2 and A3 is not the plaint schedule property. The plaint schedule property is only a small portion of the whole properties obtained under Exts.A2 and A3. Under Ext.A2 property comprised in Survey No.677 was obtained and under Ext.A3 property in Survey No. 506 was obtained by the assignor of the respondent company. It was thereafter the properties covered under Exts.A2 and A3 were assigned in favour of the respondent under Ext.A1 assignment deed. Therefore when Exts.A1 to A3 take in a large extent of property and the plaint schedule property forms only part of that property boundaries will not tally. First appellate court has elaborately considered this aspect on the basis of Ext.C1(a) plan where on the left side, the lie of the property in Survey No.677, 1022 and 506 were marked. First appellate court rightly found that if the property covered under Exts.A2 and A3 and A1 are to be appreciated in the light of the boundaries shown in that plan,

boundaries of Exts.A2 and A3 tallies with that property of the plaint schedule property and item No.1 of plaint schedule property is only a portion of the property and first respondent has title to the property. I find no reason to interfere with that finding.

15. Evidence also establish that it was under Ext.A4 license first respondent allowed second respondent to occupy item No.1 of the plaint schedule property for cultivating vegetables with specific direction that second respondent is not entitled to make any improvements. Ext.A4 shows that under Clause 9 second respondent was prohibited from effecting any permanent structures or improvements. It was also provided that in case improvements are effected in violation of that direction, second respondent is not entitled to claim any value of improvements. Appellants are only claiming right over the property under second respondent. The right obtained by them under Ext.B1 is the right got assigned in favour of the second respondent under Ext.X1 and over the property in Survey No.1022. Appellants cannot claim any right or title to the property covered under Exts.A1 to A3. They cannot be heard to contend that as a transferee they effected improvements bonafide. The transfer in

their favour under Ext.B6 was in 1976 and in 1978 the suit was instituted. Improvements if at all could have been effected only within the short span of two years. When evidence establish that Ext.A4 specifically provide that second respondent is not entitled to effect improvements, and even if improvements are effected is not entitled to the value of improvements, the assignees of second respondent under Ext.B1 are also not entitled to claim value of improvements. Though reliance was placed by learned counsel appearing for the appellant on the decision of Full Bench of this court in **Augusty Devassia V. Haridasan Nair** (1998(2) KLT 6)facts are entirely different. In the light of Ext.A4 which prohibits the second respondent from effecting improvements and as second respondent is only a licensee, neither the second respondent nor his assignees under Ext.B1 are entitled to claim value of improvements. First appellate court rightly granted the decree as prayed for. There is no substantial question of law involved or merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.no.789/1993

JUDGMENT

11.6. 2007